

**United Parcel Service, Inc. and Carlos Eaves. Case  
9-CA-15622-2**

August 23, 1982

**DECISION AND ORDER**

**BY MEMBERS JENKINS, ZIMMERMAN, AND  
HUNTER**

On February 5, 1982, Administrative Law Judge Phil W. Saunders issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

<sup>1</sup> The Charging Party asserts that the Administrative Law Judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the Respondent's witnesses. As the Supreme Court stated in *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd, 138 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

**DECISION**

**STATEMENT OF THE CASE**

PHIL W. SAUNDERS, Administrative Law Judge: Based on a charge filed on July 29, 1980, by Carlos Eaves, herein the Charging Party or Eaves, a complaint was issued on September 11, 1980, against United Parcel Service, Inc., herein Respondent, Company, or UPS, alleging a violation of Section 8(a)(1) and (3) of the Act. Respondent filed an answer to the complaint denying it had engaged in the alleged matter. Both the General Counsel and Respondent filed briefs in this matter.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

**FINDINGS OF FACT**

**I. THE BUSINESS OF RESPONDENT**

Respondent, a New York corporation, is engaged in the transportation and delivery of packages throughout the United States from terminals located in various cities of the United States, including its terminal or center at Huntington, West Virginia, the only terminal involved in this proceeding.

During the past 12 months, a representative period, Respondent performed services valued in excess of \$50,000 for customers located outside the State of West Virginia.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

Teamsters Local Union 505, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union or Local 505, is a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

It is alleged in the complaint that on or about March 13, 1980, Respondent discharged employee Carlos Eaves because he joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and also in order to discourage other employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The General Counsel maintains that Eaves was terminated because he filed certain grievances. Respondent contends that Eaves was discharged as a result of stealing time and falsifying records.

Respondent is engaged in the business of delivering small packages and, in order to best accomplish its operations, maintains centers throughout the United States, as well as Canada and Germany. One such center, and the only location involved in this proceeding, is located in Huntington, West Virginia, and at all times relevant to the instant matter, is designated the Huntington-Barboursville Center. It appears that three separate operations are carried out at the Huntington-Barboursville Center—feeder operations by which trailer truckloads of packages are delivered from one center to another; sorter operations whereby packages delivered to the center are sorted for shipment by feeder trucks to other centers or delivery in the Huntington-Barboursville area; and package delivery whereby packages are delivered to individual homes and businesses and are picked up from individual homes and businesses for delivery to the center.

It further appears that for many years Respondent has had a collective-bargaining relationship with the Union

at all its centers, and when UPS opened operations in West Virginia in 1964, it voluntarily recognized the Union. Moreover, the evidence shows a rather long relationship between UPS and the Union, and there is no evidence in this record of any union animus or bias on the part of the Company.

Local 505 represents the hourly employees at the Huntington-Barboursville Center, and UPS and the Union, including Local 505, are presently parties to a collective-bargaining agreement effective May 1, 1979, and terminable as of April 30, 1982, and which is denominated The National Master United Parcel Service and Atlantic Area Supplemental Agreement.<sup>1</sup>

Further background evidence reveals that since UPS is a motor carrier engaged in interstate commerce, it is governed by trucking regulations promulgated by the Interstate Commerce Commission, and these regulations entitled "Federal Motor Carrier Safety Regulations"<sup>2</sup> prescribe certain records which must be maintained by the motor carriers and their drivers. Such regulations require that a driver maintain a daily log of his activities showing miles driven, number of hours spent on duty driving, the number of hours spent on duty but not driving, and the number of hours spent off duty. Failure of a driver to make a log, or to make required entries on the log, makes both the driver and the carrier subject to prosecution. Furthermore, in addition to keeping and preparing a daily log, a UPS feeder driver is also required to maintain certain other records—he must keep a daily timecard which shows the time he begins work, the time he takes his breaks, and the time he finishes work—such entries are made by inserting the card in a timeclock which records the time on the card. A feeder driver is also required to maintain a daily tachograph chart.<sup>3</sup>

As further pointed out, Respondent also has specific rules, set forth in the collective-bargaining agreement, governing breaks taken by feeder drivers. Article 43 of the bargaining agreement provides for a 15-minute coffeebreak to be taken between the second and third hour, a 45-minute lunch to be taken between the fourth and sixth hour on duty, and no other breaks. However, drivers are permitted a "safety check" on the return leg and during which they may get a cup of coffee to go, or attend to personal needs, if they hold the stop to 10 minutes or less.

The Company also has an established pretrip procedure by which feeder drivers are required to check their equipment at the beginning of their shift before leaving. This procedure requires the visual inspection of the fuel tank to determine whether or not the tank is full.

Additional background evidence shows that the alleged discriminatee Carlos Eaves was well aware of

these various operating rules and procedures prior to the immediate events and circumstances described herein.

Carlos Eaves was employed in the Huntington-Barboursville Center from June 1964 until March 13, 1980. During the last 3 or 4 years of his employment, he, as a feeder driver, drove the "Columbus turnaround"—that is he drove a truck from Huntington to the Columbus, Ohio, hub or center, and then returned to Huntington in the same shift. As a feeder driver on the daily Columbus run, Eaves drove a tractor-trailer rig pulling two trailers from Burlington, Ohio, to Columbus and return. He did not, however, pull double trailers to or from the Huntington Center as West Virginia law prohibits that practice. His scheduled starting time from Huntington was 7:45 p.m., and his scheduled arrival times at Columbus, Ohio, was 12:30 a.m. His usual time of departure from Columbus, Ohio, was 2:45 a.m. and his arrival time at Huntington was approximately 6:30 a.m.<sup>4</sup>

The exhibits introduced into this record as background reveal that on March 18, 1969, Eaves was given a warning letter by then Division Manager Lloyd Taylor for making false entries on his timecard. On September 26, 1972, Eaves was advised by his supervisor, Ray Engle, as to the proper usage of the tachograph. In January 1973, Eaves was advised by Ray Engle as to the proper procedures for punching the timeclock, when it was permissible to take breaks, and again as to the proper usage of the tachograph. On April 14, 1973, Eaves was admonished not to take unauthorized breaks; on June 21, 1973, he was told to punch his timecard to properly record his lunchbreak; on July 28, 1973, he was again admonished not to take unauthorized breaks; on September 30, 1977, Eaves was given a warning letter by Feeder Manager Ron Held for repeated delinquency in handing in his tachograph charts at the end of his shift; and on January 12, 1978, Eaves, along with all other feeder drivers, was given a reminder as to the required recordkeeping and as to authorized breaks. However, on the other side of the picture, Eaves enjoyed a very good driving record as evidenced by 15 successive annual safe driving awards, and received substantial recognition for his service to Respondent as evidenced by official correspondence—including a November 10, 1970, memorandum lauding Eaves' performance as a driver at Lexington, Kentucky; a November 18, 1975, memorandum of commendation from the Columbus hub where Eaves last pulled his loads to and from; a three-page handwritten memorandum dated May 13, 1975, by Ron Held, Eaves' last feeder manager, recounting the favorable reports that he had received concerning Eaves' performance while on the Covington, Virginia, run. Additionally, Eaves' con-

<sup>1</sup> Resp. Exh. 5.

<sup>2</sup> Resp. Exh. 3.

<sup>3</sup> A tachograph is an instrument mounted inside the tractor and which records various functions of the vehicle—revolutions per minute of the engine, number of miles traveled by the vehicle, speed of the vehicle, and length of time of vehicle movement. These recordings are registered by having the driver, at the beginning of his shift, open the tachograph, insert the two-sided chart, close the tachograph, and then remove the chart only after the shift is completed. The tachograph is not to be opened or tampered with during the particular shift or run involved.

<sup>4</sup> The following named persons occupied the position set forth opposite their respective names and have been, at all times material herein, supervisors of Respondent within the meaning of Sec. 2(11) of the Act:

S. George Bodnar—supervisor (until July 1980)  
Owen Richard Bowers—automotive supervisor  
Rudy Dickens—center manager  
Ronald E. Held—feeder manager  
Don Krevosh—division manager  
Ross D. Perkins—feeder supervisor  
Ron Thomas—division manager  
Dave Withers—district manager

tribution was recognized at Lexington, Kentucky, by the fact that when he completed his work there the personnel held a dinner on his behalf. The General Counsel points out that although Eaves had received some minimal comments on deficiencies over the years, they were insignificant in nature and comparison to deficiencies of other employees who received lesser discipline, and that Eaves' record never warranted any discipline past the level of a written warning, and there was no evidence that Respondent ever attempted to impose the next available sanction of suspension against Eaves before discharging him. Moreover, according to the terms of the applicable collective-bargaining agreement, all warning notices were effective only for a period of 9 months from date of issuance, and a previous warning is required before imposition of discharge or suspension.

Eaves testified that in the fall of 1979, while fueling his tractor at the Huntington Center, he started having trouble with water in his fuel tanks and that he made numerous complaints to management about it.<sup>5</sup> On or about December 4, 1979, an incident occurred on Eaves' return trip to Huntington, which he attributed to water in the fuel. Eaves described the incident as follows:

I was coming back from Columbus and my tractor kept losing power and it was losing power and it just didn't have enough of what it ought to have and it seemed to be gettin' weaker and there was an exit right ahead of me and I told the guy that was following me in another UPS truck on my C.B., that I was going to have to get off the road, my tractor was losing power, I was going to have to get some new fuel, I have water in my fuel.

I went over there [Wheelersburg, Ohio] and bought twenty dollars worth of fuel, before I put it in I drained my fuel tanks and put the twenty dollars worth of fuel . . . .

\* \* \* \* \*

All right, before I did any of this, I called the Center Manager, the terminal manager, Rudy Dickens, and told him exactly what had happened and told him I had water in my fuel and what I was going to do and I requested or made a suggestion that he send the other driver, which was Dale Hazelett to met [sic] me at Burlington or further on down the road in case my tractor wouldn't pull up

<sup>5</sup> During the winter months, UPS took several steps to correct the water problems in their fuel. The dual fuel tanks on the truck tractors were generally drained daily during the cold periods, and the normal amount of water drained from tractors was two to three tablespoonsful. Moreover, alcohol was added to the fuel to prevent freezeups. An independent service Company, Lovelet Repair, was also called in by Huntington Center Manager Rudy Dickens to drain the *in-ground* fuel storage tanks from which the fuel was pumped. The storage tanks were drained of approximately 1 inch of water, an amount normally found in such tanks, but thereafter, according to supervisors, the storage tanks were checked daily, and no abnormal amounts of water were found. However, in or about January 1980, after registering complaints, Eaves was instructed to fuel his tractor at Respondent's Columbus Center. Manager Rudy Dickens testified that Eaves was the only driver using diesel fuel to complain about water in his fuel tanks. It appears that later on a leak was discovered in the ground tanks at Huntington and the other drivers were then told to fuel elsewhere.

enough to get the trailers up here, he did that and he thought it was a good idea.

All right, I drained my tanks, bought twenty dollars worth of fuel, put it in my tractor and made it the rest of the way in, it didn't have good power, but I made it in.

The Respondent contends that on this occasion, contrary to Eaves' insistence that he had water in his fuel, the evidence showed that Eaves had run out of fuel. It appears to me that the credited testimony in this record adequately sustains Respondent's position.

After Eaves called Center Manager Rudy Dickens about his situation at Wheelersburg—Dickens, in turn, called Ross Perkins, the feeder supervisor, to advise him that Eaves would be late, and Ross Perkins then called Ron Held, feeder manager, in accordance with UPS' practice of advising managers when a load would be delayed. Perkins advised Held that Eaves' asserted reason for being late was fuel-line freezeup, but Ron Held became suspicious that Eaves had run out of fuel instead of freezing up, and relative thereto testified as follows:

Q. What was your reaction to this information?

A. Well my reaction was that \$20 worth of fuel if he had fuel-line freeze-up wouldn't have done any good; and it wouldn't have thawed ice out of the fuel. My question was: Did we run out of fuel or did we have fuel-line freeze-up?

Q. Why did you think perhaps he had run out?

A. Well because of the fact that \$20 worth of fresh fuel doesn't thaw out ice in the fuel.

Q. What problem with a tractor will buying fuel cure?

A. Pardon me?

Q. What problem with a tractor would putting fuel in it cure that you are aware of?

A. None.

Q. Anything other than running out of fuel?

A. . . . than running out, no.

Q. What, if anything, did you tell Mr. Perkins to do or suggest that Mr. Perkins do as a result of this?

A. I suggested that Ross [Perkins] call the Huntington Center to check the fuel records to see if the tractor was fueled the night before and make a determination of whether we did or did not run out of fuel or have fuel-line freeze-up.

Q. Okay. And did he report to you as to his findings?

A. Yes, he did.

Q. Did he find out whether the tractor had been fueled?

A. Yes, he did.

Q. And had it been?

A. No, it was not.

In accordance with the instructions received from Manager Held, as noted above, Perkins then contacted the mechanic who had conducted a PMI (preventive maintenance inspection) on Eaves' vehicle immediately prior to his run, and the mechanic, Gene Bowman, then informed Perkins that he had checked the fuel in Eaves' tractor

during his PMI and found that it was little more than one-quarter full, and that he so advised Eaves who replied that this would be enough fuel to take him to Columbus. Based on this information, Perkins then calculated that Eaves had run out of fuel in Wheelersburg—he testified:

Q. How did you make that determination that he had run out of fuel?

A. Well I called the mechanic in Huntington, which was Gene Bowman; and he had told me that on the PMI he had seen that there was a quarter of a tank of fuel in the truck. With a quarter of a tank of fuel, you have between 30 and 33 gallons;<sup>6</sup> and it averages about seven miles per gallon. That's 210 miles; and he ran out of fuel in [Wheelersburg] Lewisburg (phonetic) coming back from Columbus.

As indicated, the above conclusion by Center Manager Perkins was supported by Larry Beers. This record shows that Beers is an expert with long experience and schooling in respect to Mack trucks, the type of tractor driven by Eaves, and testified that a large amount of water in the fuel tanks would permit the engine to start and to run for approximately 3 minutes, and after that time the engine would draw water and stop running, but that a smaller amount of water would disperse with the fuel itself causing an erratic running engine with low power—however, as the engine runs the water would be dispersed through the fuel system and the erratic running engine would clear up totally and full power would return. Thus, Beers concluded that it is very improbable that a Mack tractor would perform as Eaves had alleged. Beers further testified that merely adding fresh fuel to a system that had frozen water in the fuel filters would have no effect whatsoever, and to alleviate the problem the fuel filters must be replaced.

Based on his belief that Eaves had run out of fuel in Wheelersburg, Manager Perkins then confronted Eaves in respect thereto, but Eaves denied that he had run out of fuel. Nevertheless, Perkins issued Eaves a warning letter on December 7, 1979.<sup>7</sup> The warning letter advised Eaves as to a seal control infraction at an earlier date, and that his failure on December 3 to follow proper pre-trip procedure by not physically checking his tanks had caused him to run out of fuel on December 4, and that further such irresponsibility would result in more severe disciplinary action.

On the night of December 17, 1979, Eaves once more had trouble with his tractors and which he again attributed to having water in the fuel. Eaves testified that on this occasion water contaminated his fuel at Chillicothe, Ohio, in bitter cold weather, causing a complete shut-down of his tractor, and that he was stranded for nearly 5 hours, and it was then necessary that his tractor be towed into Columbus and, thereafter, Shop Supervisor George Hurt told Eaves that he had drained 5-1/2 gallons of water out of the fuel tanks.

Larry Beers, an expert in Mack engines, explained in detail, as fully outlined in this record, the numerous me-

chanical operations and workings of a diesel Mack fuel system and the manner in which the engine heats the fuel. From this credited explanation of Beers, I must conclude that the description given by Eaves of his freezeup in Chillicothe is a mechanical impossibility or at least highly unlikely.<sup>8</sup>

Eaves testified that starting in the late fall of 1979, he also began experiencing various other mechanical difficulties with the tractor assigned to him in addition to problems related to water contamination. He stated that the difficulties included a loose right front wheel, a lack of heat in the tractor, front-end alignment, brake problems, and electrical problems affecting the lights, but the most significant problem he experienced with the mechanical condition of his tractor was related to the fuel pump, and which made it difficult to regulate the speed of the engine and caused the tractor to surge—a safety problem. It appears that Fleet Supervisor Richard Bowers was well aware of these complaints through Eaves' direct contact with him concerning the fuel regulation problem on his tractor as early as December 1979 or January 1980, and also through mechanic Gregory Johnson, who spoke to Bowers about the surging problem on Eaves' tractor on several occasions.

Eaves maintained that although he talked and complained to Manager Rick Bowers, and Respondent's mechanics, Greg Johnson and Gene Bowman, about these problems, nothing or little was done about them. Eaves also maintained that he had these problems with the fuel pump for approximately 2 months prior to his discharge and that the problem still existed at the time of his discharge, and that the mechanics at the Huntington Center did not try to fix the problem.

Several witnesses for Respondent testified as to the steps and procedures they took to rectify the "surging problem," and Manager Bowers stated that in late February 1980, the tractor being driven by Eaves was again sent to the Mack truck dealerships and at this time the fuel pump was replaced. Mechanic Eugene Bowman testified that the tractor being driven by Eaves was in excellent shape—that when Eaves complained about the cab heater, it was fixed (a new thermostat put in); that the front end was aligned; and that a complete set of new tires were also installed.

In the final analysis, Respondent introduced sufficient testimony which showed its good-faith efforts to correct these mechanical problems, and the special problem relating to the fuel pump was also handled and fixed, even though it required considerable attention and efforts to do so.

On December 18, 1979, Eaves prepared a grievance report requesting the removal from his personnel file of the warning letter he had received on December 7 for running out of fuel. Also, on December 18, 1979, Eaves filed an additional grievance with respect to water in the

<sup>6</sup> This calculation was based on the fact that the fuel tanks hold 120 to 126 gallons of fuel.

<sup>7</sup> G.C. Exh. 10.

<sup>8</sup> Kenneth Scott, an employee of VDO Argo Instruments Company and an expert in the analysis of tachograph charts, also testified for the Company and in so doing analyzed Eaves' tachograph chart for the run of December 17 and 18, 1979, and in relation thereto stated that the chart showed clearly that the truck did not suddenly "freeze up" as testified to by Eaves, but was parked, permitted to idle, and stopped and started several times during the time it was parked.

fuel which allegedly caused his breakdown in Chillicothe the previous night. On December 19, 1979, Eaves filed another grievance alleging that he was being "harassed" much more than other feeder drivers.<sup>9</sup>

Sometime around January 10, 1980, a grievance meeting was arranged and was to take place in the morning after Eaves finished his run. However, Manager Ron Held was 5 or 6 minutes late in arriving and as a result Eaves left the meeting before Held arrived. The president of Local 505, James Boyd, was present in order to represent Eaves.

A subsequent grievance meeting was scheduled to take place on January 21, 1980. This meeting resulted from a request that District Manager David Withers received from Local 505 president Jim Boyd. Withers stated as follows:

Q. What did Mr. Boyd tell you about the situation?

A. He told me that Carlos [Eaves] was having some problems and wanted to meet with me and the Division Manager and his Feeder Manager.

Q. What did you say?

A. I told him I would look into it. I came back and got ahold of his Division Manager, Don Krevosh. Don Krevosh alerted me to the fact that the meeting had been set up prior with Carlos Eaves that Carlos Eaves had left and gone home; so I instructed Don to once again get Ron Held and make sure that there was a business agent involved with it, preferably Jim Boyd, and have another one.

Pursuant to such instructions, Manager Held contacted Huntington Center Manager Rudy Dickens and had him call Local 505 President Jim Boyd in order to set up the meeting and Dickens then had Local 505 contact Eaves. It appears that the meeting was scheduled for Monday, January 21, because Eaves did not work on Sunday nights and management did not want any excuses the next morning or any problems of having to leave the Center early.

Manager Held arrived at the Huntington Center at about 7:45 a.m. on January 21. Jim Boyd was present as well as another union representative, Larry McDowell. After waiting 45 minutes without Eaves showing up, Ron Held asked Jim Boyd if he would like to contact Eaves, and Boyd replied that he had already done so. Ron Held then stated:

Since we have waited 45 minutes, I see no reason to wait any longer. I said, as far as I'm concerned this problem is resolved and the warning letter stands.

\* \* \* \* \*

THE WITNESS: Jim Boyd made a comment at that time and said That's right. If he wanted to be here to defend his grievance and defend the problem, he would have been here.

<sup>9</sup> See G.C. Exhs. 12, 13, and 14.

To the knowledge of all parties concerned, no further action has been taken by anyone concerning these grievances with the possible exception of the order from Withers that Eaves fuel his tractor in Columbus rather than in Huntington, as aforesaid.

Respondent's feeder supervisor at Huntington, Ross Perkins, testified that during the period of 6 or 7 months preceding the discharge here in question (March 13, 1980), he noticed that the tachograph charts indicated that Eaves was taking improper breaks which were not recorded on his timecard, and stated that he then counseled Eaves about this matter, but it merely resulted in only temporary improvement, and after consultation with Managers Ron Held and Don Krevosh, he determined to follow Eaves on his Huntington to Columbus run. Moreover, Perkins asked Richard Bowers, then fleet supervisor, to accompany him in order to verify the times, and who would also be present in case of a breakdown.

In accordance with the above, Perkins and Bowers followed Eaves in Perkins' truck on the night of March 12, 1980, as he made his run from Huntington to Columbus and had their first contact with him in Burlington, Ohio—the first contact was by C.B. radio and then Eaves was picked up by sight—they followed him to Portsmouth, Ohio, where he took his first break. It appears that Perkins made notes of the times and places of the stops and Bowers verified the times. The Portsmouth break took place at Frisches Big Boy Restaurant and lasted from 9:50 p.m. until 10:13 p.m., for a total of 23 minutes. Perkins testified that during this break, he got out of his own vehicle and walked to Eaves' tractor and determined it was running, and that it should not have been left running as it is a waste of fuel.<sup>10</sup>

After leaving Portsmouth, Eaves then drove to a cafe called the Biscuit Palace in Waverly, Ohio, where he went inside and stayed from 10:38 until 11 p.m.—a period of 22 minutes. Perkins testified that while Eaves was inside the building, he checked Eaves' vehicle and which was again left running, and that when Eaves came back out, he again drove off without checking his vehicle by walking around it.<sup>11</sup>

Perkins and Bowers followed Eaves to the Columbus Center, where he arrived at approximately 12:30 a.m., but they did not follow him inside, and therefore had no actual knowledge of what he did or did not do inside the Columbus Center. Eaves testified that while at the Columbus terminal he was working all the time at his normal duties and only took his regular 45-minute lunch-break, but Respondent contends otherwise and I will detail all such testimony and surrounding circumstances later on.

<sup>10</sup> Eaves admits stopping in Portsmouth, but testified he was sick with the flu and had to get some aspirins and then stayed there "a few minutes" with some coffee. Eaves did not record this stop in his log, but considered it as driving time. Moreover, he did not insert his tachograph chart on the evening in question until he reached Burlington.

<sup>11</sup> Eaves testified that at the Biscuit Palace in Waverly, Ohio, he took his regular 15-minute coffeebreak which he was entitled to, and then went back out to his tractor—made a "quick go around" checking tires, light, cables, and safety chains—and then drove on to the Columbus Center.

Eaves left the Columbus Center at or about 2:40 p.m. on March 13, 1980, for his return run to Huntington, and was followed by Perkins and Bowers. Eaves again stopped at the Biscuit Palace in Waverly. Perkins testified that Eaves stayed on this break for 29 minutes (4 to 4:29 a.m.), and then came out and left. Perkins stated that during the time in question there were other units or trucks in the parking lot of the Biscuit Palace, but the rig being driven by Eaves was "not blocked in" and that Eaves was able to drive off right after emerging from the cafe.<sup>12</sup>

From his stop at Waverly, Eaves then proceeded to Burlington where he disconnected his rear trailer. He then went on to the Huntington Center, arriving at approximately 6:25 a.m. Perkins stated that when Eaves got to the Huntington Center, he pulled into the lot, went inside the building for a few minutes, came back out, and then with another employee walked across the street to the coffee shop, stayed there 14 minutes while on the clock, got coffee, and then came back to his tractor and sat there like he was doing some kind of paperwork. Supervisor Perkins testified that he had informed all of the Huntington feeder drivers not to go to the coffeeshop while they were on the clock, and that in November 1979, he had specifically told Eaves not to do so.<sup>13</sup>

Fleet Supervisor Richard Bowers testified to essentially the same observations as Perkins on the night and morning here in question. He and Perkins then contacted Division Manager Don Krevosh to report what they had observed, and as a result Krevosh set up a meeting for that afternoon and instructed Perkins to obtain Eaves' timecards, logs, and tachograph charts from the first of the year and to prepare a memo of the events for the night here in question.<sup>14</sup>

On the afternoon of March 13, 1980, Division Manager Don Krevosh met with Bowers and Perkins, and asked them to describe what had happened when they had followed Eaves. As they related the previous night's events from their notes, Krevosh then made his own notes as to particular points and time periods. Bowers and Perkins also had with them Eaves' tachograph chart, log, and timecard, and in respect thereto Krevosh stated:

<sup>12</sup> Eaves testified that he stayed 10 minutes on his break at Waverly, but when he got ready to leave his tractor was blocked in by a rig from Commercial-Lovelace, and as a result he went back into the cafe and asked the driver if he would let him out, but the Lovelace driver would not do so until he finished his breakfast. Eaves testified that the total amount of time he was there amounted to about 25 minutes.

<sup>13</sup> Eaves testified that upon his return to the Huntington Center, he was told by Supervisor George Bodner that there was no work to be done right at the present and he could go across the street and get coffee if he wanted to. Eaves stated that after paying for his coffee and cigarettes he then walked back to his truck, got in, drank his coffee, did a little paperwork, and awaited further instructions. He was then told to spot his trailer, and after so doing checked out. Former supervisor George Bodner testified that on the morning in question, Eaves looked sick and since he was not needed for another 15 minutes, told him to go across the street and drink some coffee. Bodner stated that it was not unusual for drivers to do this while they were on the clock, and that Manager Rudy Dickens had advised him this was all right to do so long as the drivers only stayed for a minute or two.

<sup>14</sup> Resp. Exh. 57, signed by both Bowers and Perkins, states that on March 12 and 13 they observed Eaves taking four illegal breaks; excessive idling on the motor; failure to properly pretrip his tractor; and falsifications of his daily log and timecard.

They showed me on his tach where he had stopped and they showed me that he had kept his vehicle running all the time and that he had verified the tach with the time card. They also showed me the log where he had put in an extra break—put in a break. They told me—showed me the alternations on his time card.

Krevosh then reviewed the chronology of events as recorded on Eaves' timecard and determined that Eaves had entered a break from 10:45 until 11 p.m. after he had punched off the clock on the morning of March 13. Krevosh also reviewed Eaves' log which showed that Eaves had originally shown the time from 10:45 until 11 p.m. as driving time, but then later came back and interrupted the driving sequence by entering a break.

As pointed out, Perkins and Bowers also had with them Eaves' tachograph charts, timecards, and logs from the first of January 1980 up through March 13, 1980.<sup>15</sup> Krevosh then reviewed those documents and was able to conclude that:

Well it showed that some days he turned in a tach; some days he turned them in blank; and the days that he turned them in that had recordings on them showed he took breaks continually going up to Columbus and he took breaks on the way back from Columbus to Huntington.

Moreover, Manager Krevosh compared these documents with the events of the night of March 12, 1980, and found that, "Well it showed almost the exact thing, that he took breaks; normally two breaks going up to Columbus and one break coming back." Krevosh also testified that "in most cases, on the tachs it showed that he had taken anywhere from 40 minutes to over an hour in excess of his lunch time in Columbus; and his lunch time in Columbus he always showed 1:30 to 2:30. He always showed an hour for lunch time in Columbus," and that the breaks were usually not entered on Eaves' log or his timecard.

Krevosh then called District Manager Dave Withers relating to him what he had learned as to Eaves, and he was told to set up a meeting that evening in order to get Eaves' side of the story. At this meeting on the evening of March 13, 1980, the Respondent was represented by Krevosh, Jim Beard, Rudy Dickens, and Ross Perkins, and for Local 505 union steward, Larry Bowen and Business Agent Larry McDowell. Carlos Eaves was also present. At the beginning of this meeting Krevosh asked Eaves if he knew why he was there, to which Eaves replied "no." Krevosh then asked Eaves if he knew that he had been followed the previous night, and to which Eaves replied in the affirmative. Krevosh then asked Eaves to reconstruct his previous night's work, and Eaves asked Business Agent McDowell if he had to do so. McDowell suggested that he comply and Eaves then told Krevosh what he had done the previous evening.

Eaves stated that he went from Huntington to Burlington, Ohio, and hooked up the second of his two trailers;

<sup>15</sup> See Resp. Exh. 16-46.

from Burlington he went to Waverly and took a break; and from Waverly he proceeded to Columbus; that at the Columbus Center he unhooked his inbound doubles, hooked up his outbound doubles, got them ready, put them on line, fueled, and had his lunch. He stated that he took a 45-minute lunch in Columbus. On his return trip Eaves informed Krevosh that he left Columbus and went back to Burlington, and there disconnected his double trailers, drove to Huntington, did his paperwork, and then punched off the clock. Krevosh testified that in the reconstruction of the previous night's events Eaves did not mention a stop in Portsmouth, nor did he mention taking a break in Waverly on the return trip from Columbus, and he also did not tell Krevosh that he had taken a break in Huntington after he had returned to the center.<sup>16</sup>

It appears that after Eaves had recited his story, Krevosh then reconstructed what Supervisor Bowers and Perkins had observed the previous night—Krevosh stated that Eaves had left Huntington late, but to which Eaves replied that his tractor was not there on time. Krevosh then told Eaves that he had failed to properly pretrip his vehicle, and to which Eaves replied, "No, I pre-tripped it," but Krevosh stated, "If you had pre-tripped it, you would have put your tach in Huntington rather than in Burlington." Eaves answered that he had forgotten but when he got to Burlington the tach was put in at that time. Krevosh stated:

Well let me remind you of a meeting I had with you a couple of months earlier [referring to the meeting of December 7, 1979] telling you to properly pre-trip your vehicle. Isn't putting your tach in your vehicle part of your pre-trip? Eaves acknowledged that a proper pre-trip did indeed include inserting a tach chart. Krevosh then told Eaves that aside from failing to insert the tach chart at the proper time and location, he also set the clock back as if he were starting in Huntington. Eaves replied that "well I guess I just made a mistake."

Krevosh then advised Eaves that he was further observed stopping at Frisches Restaurant in Portsmouth for a 23-minute break. Eaves replied that he did remember the stop but that he was sick and had to stop for aspirins, but had no real explanation for the length of that stop. Krevosh then told Eaves that he was followed 30 or 40 miles to Waverly where he stopped at the Biscuit Palace for another break. Eaves argued that that was his scheduled break and that the break taken at Frisches did not count. Krevosh informed Eaves that he is entitled to one 15-minute break on the trip to Columbus, but that Eaves was in the Biscuit Palace for 22 minutes. Eaves replied, "Well I didn't do anything wrong. I might have made a mistake or I didn't realize it was that long."

Krevosh next informed Eaves that he was followed to Columbus and that he had been in Columbus for approximately 2 hours. Krevosh asked Eaves again about the length of his lunch period in Columbus, and to which

Eaves replied, "I only took 45 minutes." Krevosh also asked Eaves whether he slept in his tractor at night, and Eaves stated that "I think I may have."

Krevosh testified that in respect to the return trip, he advised Eaves that he was observed stopping in Waverly on the return trip, and that Eaves stated, "Well I am allowed a 10-minute safety check." Krevosh conceded that Eaves was entitled to stop for a safety check, but that Eaves had not checked his vehicle during that stop, and had been observed at the Biscuit Palace in Waverly longer than 10 minutes. Eaves argued that he was blocked in. Krevosh then turned to Perkins and asked whether in fact Eaves was blocked in, to which Perkins replied "no."

Krevosh then advised Eaves that he was observed taking an additional break when he returned to the Huntington Center and that he had recently been reprimanded by Perkins not to go across the street for coffee. Eaves admitted taking such a break but stated, "Yes, but I only took a few minutes. I had to get a pack of cigarettes," and according to Krevosh, Eaves then admitted that he was not permitted to go across the street to get coffee but, "I guess I made a mistake."

Near the end of the meeting, Krevosh further told Eaves:

Well your so-called mistakes are very costly to United Parcel Service and these are more than just mistakes. I said, I would like to recap once more what you did wrong. I said, you left the building late. You failed to pre-trip your vehicle properly. You inserted your tach in Burlington instead of Huntington. I stated that he not only put his tach in at the wrong time, you put your tach back as if you started in Huntington. I said you took unauthorized breaks going up. I said you didn't report to a supervisor. I said you left your engine running all the time, the whole night; you left it unattended, unsecured; and you took breaks on the way back. I said these are more than just simple mistakes. I said that for that reason, I am going to have to discharge you from my employ.

Eaves then mentioned that he felt he had done nothing wrong and that he was a good employee. Krevosh replied that he had not only taken unauthorized breaks on the night of March 12, but that he had been doing it for months. Eaves replied that, "Well I never intended to be anything but a good employee. I always try my best. I always get the load in on time." Krevosh then advised Eaves that his job is much more than just getting the load in on time.

As pointed out, Eaves' version of what occurred the night and morning in question is not significantly different from the admissions he made after being confronted with the evidence. On his outrun he admitted the stop in Portsmouth, admitted that he failed to log this break in his logbook, and tried to explain his failure to note it in his timecard on the basis that he considered it as "time driving." He also admitted his stop at the Biscuit Palace in Waverly, but maintained that the break was only 15 minutes and that he checked his vehicle for 5 or 6 min-

<sup>16</sup> Eaves testified that in his reconstruction of events, he did mention his stop in Portsmouth because of illness, and on his return also mentioned being blocked in at Waverly.

utes after the break. On his return trip Eaves admitted an extended break in Waverly, and testified he intended it to be a 10-minute safety check, but then could not leave because he was blocked in. Eaves admitted that he did his paperwork on the stop in Burlington. He admitted changing his timecard to reflect the stop on the way up at Waverly, and to shorten his lunch hour in Columbus from 1 hour to 45 minutes. He also admitted that he might have taken his tachograph chart out in Burlington—"if I finished up my paper work there." As noted, Eaves' testimony as to what occurred in Huntington on March 13 had one additional explanation, not heard before—for the first time Eaves alleged that the coffee-break in Huntington was authorized by Supervisor George Bodner, and admitted that he logged this time as time worked.

It appears that within a few weeks or so following the discharge of Eaves, Union Agent Larry McDowell contacted District Manager Withers and between them arranged for a meeting at the Dunbar Center to again discuss this situation. The Company had several people present and Local 505 also had representatives along with Eaves, but nothing was accomplished other than the parties restating their positions.

McDowell testified that prior to the Dunbar meeting, he had also contacted Division Manager Ron Thomas asking him to intervene in behalf of Eaves, but Thomas informed him, according to McDowell, that he had been told to stay out of the matter, and that he (Thomas) never really cared what Carlos Eaves did so long as he got his packages into the centers on time.

Manager Thomas denied the above conversation attributed to him, and testified that if McDowell had called him on this matter, he would have told him to contact Manager Krevosh, as he (Thomas) had no responsibility for Eaves—he was not assigned to Thomas.

#### Final Contentions and Conclusions

Respondent has taken the position that the instant matter was resolved by the Atlantic Area Parcel Grievance Committee, herein AAPGC, by its denial of Eaves' grievances over his discharge. The General Counsel contends that such deferral is wholly inappropriate.

On March 14, 1980, Division Manager Don Krevosh sent a mailgram to Carlos Eaves advising him that he had been discharged the previous day as a result of his dishonest acts. Eaves then went to the union hall to prepare a grievance concerning his discharge. In his grievance of March 14, 1980, Eaves claimed that his discharge was unjust and improper and requested that he be reinstated with all backpay and benefits, but in this grievance made no mention of Bodner's permitting him to take the coffeebreak after he returned to Huntington or that he had been blocked in at the cafe in Waverly on the return trip.<sup>17</sup>

This record shows that both business agents for Local 505, Larry McDowell and James Boyd, contacted District Manager Dave Withers with respect to the discharge of Eaves, and wanted Respondent to reconsider his discharge. Withers informed them that he would be

willing to meet with them and such a meeting did take place, as detailed above. District Manager Withers testified that he agreed to the meeting because he "wanted Carlos [Eaves] to tell me what happened . . . I wanted to see if Carlos would tell me the truth of what happened that night. Carlos never admitted anything." Withers stated that at this meeting Eaves usually opened each sentence with "if I did anything wrong" and he also said a couple of times "It must be just a mistake I made." Withers testified that Eaves would not admit that he had done anything wrong and, therefore, he decided to let the discharge stand.

Eaves' grievance was presented to the AAPGC on May 8, 1980, pursuant to the terms of article 41-grievance procedure, sections 2 and 4 of the Atlantic Area Supplement to the National Master United Parcel Service Agreement. The panel was composed of equal representatives of labor and management. Don Krevosh represented Respondent and also present for UPS were Dwight Barackman and Dave Withers. Eaves was represented by Larry McDowell and Jim Boyd, president of Local Union 505. Carlos Eaves was also present at the hearing.

During the initial phase of the meeting a formal statement was submitted by UPS setting forth the events of March 12 and 13, 1980, and in so doing showing improper breaks on Eaves log and timecard, and argued that following his discharge an audit of his records for the 2 previous months revealed that Eaves continually took unauthorized breaks, falsified his records, and frequently left his tractor idling for his entire shift.<sup>18</sup>

Local 505 submitted a formal outline stating, in part, that Eaves was discharged because of his protest or grievance to his warning letter of December 7, 1979, and as a result of this grievance, Manager Krevosh took it upon himself "to get" Carlos Eaves. The Union in its statement to the AAPGC also attacked Respondent's position that dishonesty occurred—that Eaves had not stolen 88 minutes nor had he altered his timecard or logbook. Finally, the Union submitted laudatory statements of Eaves' job performance and character both from present UPS supervisors and from coworkers.<sup>19</sup> Following the formal statements, testimony and arguments were received.<sup>20</sup>

Respondent argues that under *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), deferral to an arbitration award is proper where (1) the arbitration proceedings appear to have been fair and regular, (2) all parties had agreed to be bound by the decision, (3) the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the National Labor Relations Act, and (4) the issues giving rise to the unfair labor practice charge were presented to and considered by the arbitration panel—moreover, in the instant case, all of the *Spielberg* deferral requirements have been met, and that the hearing before the AAPGC was conducted in accordance with the principles of fundamental fairness and impartiality. Furthermore, argues Respondent, Larry

<sup>18</sup> See Resp. Exh. 4-c.

<sup>19</sup> See Resp. Exh. 4-d and attachments thereto.

<sup>20</sup> See Resp. Exh. 4-b.

<sup>17</sup> See Resp. Exh. 4-d.



McDowell, Eaves' union representative at the hearing, repeatedly urged that Eaves was discharged as a result of his grievance activity, and thus it cannot be contended that the issue giving rise to the unfair labor practice charge was not before the AAPGC, and in rejecting Eaves' contentions the AAPGC, of necessity, decided that Eaves' discharge was not as a result of his grievance activity—consequently, the decision of the AAPGC is clearly not repugnant to the purposes and policies of the Act, rather it fully comports that Act's purpose of encouraging the voluntary settlement of labor disputes. Counsel for Respondent concludes his argument by stating that the contractually agreed-upon grievance machinery functioned properly to fairly settle the dispute, and the basis of the unfair labor practice charge was considered and resolved.

The record in this case is clear that no mention was made to the AAPGC of Eaves' grievance activities or other evidence in support of the General Counsel's case in this proceeding, other than the grievance Eaves had filed on December 18 concerning his December 7, 1979, warning letter, and his grievance on March 14, 1980, protesting his discharge. Thereafter, the AAPGC rendered a summary decision which precluded any review of that body's consideration, if any, of the unfair labor practice aspect of Eaves' discharge. Moreover, as also pointed out, it is obvious that the AAPGC had no neutral member on the panel and by its decision foreclosed Eaves' grievance from proceeding to the final step of the procedure before an impartial arbitrator, as provided by the Atlantic Area Supplement, article 41, Grievance Procedure, section 5.<sup>21</sup>

As noted previously herein, Eaves also filed two additional grievances in December 1979—one of them relating to water in the fuel tanks at Huntington, and another grievance which alleged that he was not treated equal with other feeder drivers and had been harassed. There are no indications whatsoever that either of these grievances or union activities was before the AAPGC.

The Board, in the lead case of *Suburban Motor Freight, Inc.*, 247 NLRB 146, 147 (1980), held:

The Board can no longer adhere to a doctrine which forces employees in arbitration proceeding to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter. Accordingly, we hereby expressly overrule *Electronic Reproduction* and return to the standard for deferral which existed prior to that decision. In specific terms, we will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. In accord with the rule formerly stated in *Airco Industrial Gases*, we will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's discriminatory actions. In like accord with the corollary rule stated in *Yourga Trucking*,

we shall impose on the party seeking Board deferral to an arbitration award the burden to prove that the issue of discrimination was litigated before the arbitrator.

The Board has continued to adhere to the general rule laid down in *Suburban Motor Freight, supra*. Indeed, in another discharge case involving the same Respondent as in the instant matter, *United Parcel Service, Inc.*, 252 NLRB 1015 (1980), the Board held that the matter therein was not appropriate for deferral under *Spielberg*, because the factual record showed that evidence concerning the dischargee's protected concerted activities was not presented to the arbitrator.

This record clearly reveals that in the instant case some aspects of the evidence adduced by the General Counsel in support of the unfair labor practice allegations were not presented to the AAPGC, and in addition the factual evidence concerning Eaves' protected concerted activities in the filing of two grievances was not presented to the panel. In any event, the AAPGC rendered such a summary denial that it is impossible to ascertain whether it took recognition of the argument advanced that Eaves was discharged in retaliation for having grieved his December 7, 1979, warning letter and the events on March 12-13, much less whether it reached any conclusions with respect to the evidence presented in these regards. Accordingly, I am not persuaded that the instant case is appropriate for deferral.

The General Counsel points out that the evidence in this record reveals that Carlos Eaves was a long-term and valued employee of Respondent with minimal problems and substantial accolades for his performance; until about November 1979, but at this time he became frustrated in his attempts to have fuel and mechanical problems with his tractor resolved and having encountered the water-contaminated fuel at Wheelersburg on December 4, 1979, he then became incensed over receiving a warning letter accusing him of running out of fuel, and at this time exercised his contractual rights to have a protest letter sent and a grievance filed. Moreover, when Eaves ran into a similar problem a few weeks later at Chillicothe, he filed additional grievances. The General Counsel argues that such grievances adversely reflected on management people directly responsible for Eaves—Feeder Supervisor Roscoe Perkins and those responsible for the equipment and fuel—Fleet Supervisor Richard Bowers, and such grievances were taken directly to the highest level of authority in the area, District Manager David Withers, who then directed that meetings be held to resolve Eaves' grievances—that Eaves did not attend at least one such scheduled meeting because Respondent's representative, Ronald Held, was late in arriving, and Eaves was never even informed of the second meeting on his grievances. It is further pointed out by the General Counsel that irrespective of Eaves' nonattendance at meetings relative to his grievances, nevertheless, his message had been delivered up the line to at least as far as Respondent's District Manager David Withers—to the effect that there were serious problems reflecting on the local supervisors at Huntington, and thus both Perkins and Bowers had reason for concern.

<sup>21</sup> See Resp. Exh. 5.

The General Counsel also rationalizes that the supervisors directly involved in this matter then bided their time until the night of March 12 when the two most aggrieved managers—Perkins and Bowers—set out to get Carlos Eaves, and even though Perkins had never even issued a warning letter to Eaves on the matters he was now concerned about. Moreover, according to the General Counsel, when the report was in concerning Eaves' run for March 12 and 13—management then moved with all deliberate speed and determination to discharge Eaves that very evening (March 13) without any consideration for his logical and plausible explanations for what he did—that Respondent was "so obsessed" with discharging Eaves that it did so even while expressing its own anxiety as to whether its case was sufficient, as evidenced by the various conversations initiated by Center Manager Rudy Dickens and Division Managers Thomas and Krevosh.

The General Counsel maintains that thereafter Respondent continued to build its case against Eaves as it went along—Krevosh accusing Eaves of not turning in a transfer slip for work at the Columbus Center on his last workday and, subsequently, he was also accused of speeding by Krevosh when Eaves had not been accused of that by Perkins and Bowers, and by the time this case came to hearing, Respondent had acquired more evidence not then known to Respondent until it prepared its case against Eaves for hearing—i.e., the Ingall writeups, experts in diesel mechanics, and tachograph charts to present evidence in support of its case that it obviously did not have when it discharged Eaves. Moreover, argues the General Counsel, Respondent also marshalled witnesses from all levels of its supervisory hierarchy who testified under the watchful gaze of District Manager Withers and Richard Bowers' supervisor, Bob Pilgrim, sat in the hearing during Bowers' testimony when there was no indication that Pilgrim was in any way involved.

Additional aspects in the argument for the General Counsel is as follows: "It is submitted that Respondent's witnesses generally demonstrated a willingness to tout the company line and say whatever was necessary to advance Respondent's cause irrespective even of their lack of competency to testify." Indeed this was abundantly demonstrated by the testimony of Ron Held when he testified, as the case wound down, without any proper authentication of the tachograph charts, to just anything that would seem to help them into evidence. Of course, Bowers and Perkins, as detailed above, demonstrated their total lack of reliability to even keep the story straight from the time of their affidavit until the time of the hearing. For the foregoing reasons, it is respectfully submitted that Respondent's case against Eaves was contrived, at the outset, by those supervisors most offended by Eaves' grievances, and that, as the matter progressed, Respondent's entire management staff locked arms in a determined effort to support those supervisors irrespective of the merits of the case.

The General Counsel also maintains that his case was presented primarily through the testimony of 12 witnesses, half of which—Marvin Gore, Ross Dale Hazelett, Larry J. Bowen, Gregory Lee Johnson, Millard Bailey,

and Kellerman Swann—were employed by Respondent at the time they testified adverse to their interest and thereby did so at the risk of incurring Respondent's ire. Accordingly, the General Counsel submits that the testimony of those witnesses is particularly credible because of the potential risk involved for current employees who are dependent upon the Respondent for their employment.

The General Counsel further relies on circumstances and events involving an incident between Eaves and Bowers in the locker room; on the different kind of "sensitivity" for other employees found in like situations; on the improper or insufficient authentication of tachograph charts and the logs of Commercial-Lovelace; on the timestudy of Millard Bailey on his Huntington-Columbus feeder run; and in certain areas on the inconsistent testimony of witnesses for the Respondent, both at the hearing and in their pretrial affidavits.

Turning first to the locker room incident. Eaves testified that he had a conversation with Manager Bowers in the locker room at the Huntington Center in January 1980. Eaves stated that Bowers then told him that he (Eaves) would "pay for the grievances." Eaves testified that Bowers had been using the restroom and at the time in question was coming out of the restroom into the locker room area, and that Mark Coats was also present in the locker room at the time.

Mark Coats, discharged by UPS in November 1980, testified on behalf of Carlos Eaves. He stated that he was employed by UPS from May 10, 1974, to November 17, 1980, but from December 21, 1978, until August 18, 1980, he was off work due to a workmen's compensation injury. Coats testified that beginning in approximately February 1980, until his return to work in August 1980, he had to go to the Huntington Center to obtain his workmen's compensation check, and that on the occasion here in question he was looking at the bulletin board in the locker room at the Huntington Center, and overheard Manager Richard Bowers tell Carlos Eaves "I'm going to fire you for filing those papers, or grievances. . . ." Coats also testified that Bowers could not see him where he was standing, and that when Bowers did discover his presence, he looked surprised, threw down a paper towel with which he had been drying his hands, and then walked out. Coats also testified that he was somewhat startled at what he had heard, and as a result walked up to Eaves and said "is there anything wrong," but Eaves just mumbled "I don't know." Coats testified further that immediately thereafter, as he was going to his car, Bowers approached him and said, "Mark, you didn't hear any of that, did you?" Coats stated that he then just looked at Bowers and got into his car and drove off. Manager Bowers denies that any such conversations with either Eaves or Coats, ever took place.

The General Counsel speculates that at this point in time it was apparent that Eaves was becoming a man to be reckoned with—that his grievances ultimately reflected on Fleet Manager Bowers, who was responsible for the supervision of the mechanical maintenance of the tractor assigned to Eaves, as well as the quality of the

diesel fuel available at Huntington, and that when Bowers encountered Eaves in the locker room he then openly informed Eaves that he would pay for his grievances. Unknown to Bowers at the time of this remark, Mark Coats was also in the locker room and overheard Bowers' statement, and thereafter Bowers showed his concern over his ill-timed announcement by following Coats out into the parking lot and attempting to get him to assure Bowers that he had not overheard the remark.

First of all, it is noted that the occurrence of the alleged Bowers threat is supported solely by the testimony of two discharged UPS employees—Eaves and Coats. Moreover, their testimony is not consistent as to what was said nor as to when the incident allegedly took place. Eaves first testified that this incident took place in 1979, but later changed it to 1980. Coats also evidenced lack of credibility with his changing description as to his conversation with Eaves. He first stated that he was positive that Eaves had said only "I don't know" to his query as to what was wrong. Later, he admitted placing in his affidavit a statement to the effect that "Bowers was mad because he filed a grievance." Eaves made no mention in his testimony of such a statement to Coats.

As indicated, Manager Bowers categorically denied the locker room incident and this denial is consistent with the surrounding facts. Bowers had nothing to do with the subject matter of Eaves' grievances—the warning letter in December and alleged harassment came from Held, Perkins, and Krevosh, and Dickens was responsible for the fuel. Moreover, Bowers had no supervisory authority over Eaves, and there is no evidence to rebut Bowers' testimony that he knew nothing about the grievances. As further indicated, even assuming, *arguendo*, that Bowers did make such a statement, there is no evidence that he had anything to do with the actual decision to discharge Eaves. Bowers, of course, did witness the events on the night in question, as aforesaid, but testified he made no recommendation as a result of his observations, and absent a showing that Bowers took some specific action to carry out the alleged threat—and there is none—there remains only a rebuttable inference, at most, that UPS terminated Eaves for his grievance activity.

In the final analysis, both by testimony and video tape, it was established by Respondent that Coat's testimony to the effect that he was not visible to Manager Bowers at the time Bowers made the alleged threat to Eaves was simply impossible. Managers Dickens and Bowers described the locker room in question and even showed by a schematic of it that anyone in the locker room could not help but see everyone in the room.

Eaves testified that *immediately before* the above alleged threat by Bowers in the locker room, he had an argument with Bowers about something being said to the effect that Eaves' son had damaged a new paint job on a package truck belonging to UPS. Manager Bowers confirmed this dispute, but he credibly placed it right after the trucks had been painted in June or July 1979 and this date is confirmed by the records relating to those paint jobs. Moreover, Bowers' testimony of the timing of the dispute was confirmed by Respondent's Customer Service Representative Art Brannon who testified as to the

content of the dispute and to a conversation with Eaves about it. Moreover, this record shows that Manager Bowers immediately apologized when he learned that Eaves' son was confined to a wheelchair, and therefore, could not have written on the truck. However, it is clear that this entire incident took place about 6 months before the alleged locker room incident, and not immediately prior thereto as suggested by Eaves.<sup>22</sup>

As to the discipline that other drivers received for improper conduct of performance in their duties, the General Counsel contends that UPS treated such drivers, who were guilty of the same infractions that Eaves was guilty of, less severely than Eaves was treated.

The testimony of Marvin Gore was presented with respect to the warning letters which he received from Respondent. Gore testified that his job, unlike that of Carlos Eaves, was a combination package car and feeder driver. Gore testified that on September 24, 1980, he received a verbal warning for taking an illegal break. In his affidavit Gore stated that he had an urgent need to make a telephone call arising from a personal problem. Therefore, he stopped at a supermarket, and shortly thereafter the center manager of his area, Wade Caldwell, inquired as to the break. Gore explained the matter to Caldwell, and was then told by Manager Caldwell that illegal breaks were a serious matter, but that he (Gore) did perform his job well and he was going to let him go with a verbal warning.

Gore also testified that he remembered receiving a warning letter on or about January 11, 1979, concerning his taking an unauthorized break and leaving his vehicle running and unattended. Gore testified that:

... stopped to get a cup of coffee, and as I recall, I had to get some change for a C.O.D. and left my engine run, it was cold weather, and of course, I had been instructed not to do that, but I did leave my engine run, and I went inside the drive-in, and got a cup of coffee, and Rudy Dickens drove by at the particular time, he was the Center Manager, and

<sup>22</sup> Mechanic Gregory Johnson testified that when Eaves was terminated he had a conversation with Manager Krevosh under the following circumstances:

Q. Do you recall the time when Mr. Eaves was discharged?

A. Yes, I do.

Q. Do you recall if you had any conversation with Mr. Krevosh about that?

A. Yes, I do.

Q. Can you tell the court what the conversation was with Mr. Krevosh.

A. Well, he was over in the 7th Avenue building, I walked in and he was standing over there at the end of the belt, and I approached him, I said "what happened to Carlos," and he said, "we disqualified him." I said, "well," I said, "Carlos was an asshole, but he wasn't that big of an asshole." He said, "well," he said, "You got a wife and family at home, don't you?" I said, "yes." He said, "I see your paperwork every day." I said, "Yeah, but how much of it stops," I said, "I do a good job and it shows." He said, "well," he said, "just don't back me into a corner." I said, "okay." And then he left.

Q. He what?

A. He left.

Manager Krevosh admits a conversation with Johnson wherein he told him that Eaves had been terminated, but denies making any remark warning Johnson not to back him into a corner on Eaves.

told me that I would receive disciplinary action for that.<sup>23</sup>

Gore remembered that afterwards there was a meeting with the shop stewards concerning the matter, but he could not recall any justification he gave for taking a break or what was said by either side at the meeting.

Gore also testified that on or about February 20, 1981, he received a warning letter from Delivery Supervisor Pat Kelly with respect to Gore's taking an unauthorized break on February 18, 1981.<sup>24</sup> Gore testified that he had stopped at a drive-in to get a cup of coffee as it was cold weather, and as he came out of the coffee shop his supervisor appeared asking him if he had not already had his lunch hour, and Gore replied that he had. Gore was then told that he would receive the disciplinary action for taking an illegal break. The General Counsel argues that thus Gore was charged with four unauthorized breaks, two of them after Eaves' discharge, and the only penalty imposed was a warning letter.

On October 18, 1979, employee Kenny Withrow was observed by Dave Wright working on his personal vehicle inside Respondent's Huntington building, using Respondent's equipment, and on Respondent's time.

Center Manager Rudy Dickens reviewed the warning letter that he issued to Kenny Withrow on this occasion and also the memo from Dave Wright to him concerning the events which led to the issuance of the warning letter.<sup>25</sup> Dickens testified that Withrow was a part-time employee who worked inside the center washing package cars and tractor trailers, but on the date in question Withrow was observed by Delivery Supervisor Dave Wright working on his private vehicle inside the Huntington Center, and thereupon Wright sent Withrow home and told him that as far as he was concerned he no longer worked for UPS. Rudy Dickens testified that an investigation was then conducted with regard to this incident and an effort was made to determine whether or not Withrow was working on his private vehicle at a time when he was being paid by Respondent, and in so doing they had obtained Withrow's timecard which showed that he had punched off the clock, but he had not entered that he was on his lunch hour. Moreover, a review of his previous timecards indicated he had been following the proper instructions with respect to entering his lunch break on his timecards. Therefore, according to Dickens, it appeared that Withrow was working on his vehicle during his normal lunch hour as disclosed by his previous timecards, and as a result it could not be established by management that Withrow was washing his vehicle on company time; thus, Withrow was simply given a warning letter stating that he could not work on his private vehicle inside the building and that he could not use the tools of the Company to work on his private vehicle. Respondent points out that Withrow was not discharged with respect to stealing time, because it could not be proven that he was doing so.

Manager Dickens further testified that on March 24, 1980, during an audit of the Huntington facility, Withrow was observed taking a 1 hour and 18-minute lunch when he was entitled to only 1 hour. Dickens stated a meeting was then held, and Withrow did not deny the fact that he had extended his lunch period. UPS gave Withrow the option to be terminated for dishonesty or resign for personal reasons. Withrow chose to resign and signed a clearance slip which said that he resigned. It appears that no grievance or any other action challenging that resignation was ever filed.

As pointed out, Manager Richard Bowers testified as to the facts and circumstances which led up to his issuing Talmadge Calloway a warning letter on February 27, 1978.<sup>26</sup> Bowers testified that Calloway is the mechanic for the Beckley Center, and that he (Bowers) and Beckley Center Manager Lee Smith were observing the Beckley Center on the occasion here in question—that in the morning he and Smith left for breakfast and when they returned to the Center, Calloway's own vehicle was not in sight, but when they entered the terminal building they found Calloway's car inside and noticed it had just been washed. Bowers asked Calloway for his timecards, and also asked him why he was washing his car inside the building—Calloway then produced the timecard and informed Bowers that he did not wash the car on Company time, but had done so on his lunch hour and had brought the car inside the building so that it would not freeze outside. Manager Bowers then issued Calloway a warning letter rather than discharging him explaining that the only way to verify that the wash job had been done on company time was by the timecard, and a portion of the timecard had been destroyed, and Bowers and Smith had not actually observed Calloway washing his car on company time.

Employee Talmadge Calloway was issued a written warning on March 2, 1981,<sup>27</sup> concerning alleged falsification of his timecard on February 18, 1981, which indicated he had completed work that he had actually not done and which, in fact, resulted in Fleet Supervisor Eugene Bowman having to obtain the parts himself and oversee the job being done to make sure it was completed. Supervisor Bowman testified that Calloway was not discharged because he was doing a "relatively good job" and this was only a "single incident" as far as Fleet Supervisor Bowman was concerned, even though Calloway *had been* discharged before.

On July 25, 1980, a warning letter was issued to employee Dale Maxwell. Maxwell's transgressions were stated as follows:

Discussed was your dishonesty by the fraudulent use of the Company telephones and your overall work record. After a complete investigation, it was discovered that you had used the Company phone to make eight long-distance calls. These calls were not only an additional cost to the Company, but the time you spent making four of the calls was during

<sup>23</sup> See G.C. Exh. 4, and which also makes reference to a similar incident involving Gore on October 20, 1978.

<sup>24</sup> G.C. Exh. 3.

<sup>25</sup> See G.C. Exhs. 5 and 6.

<sup>26</sup> G.C. Exh. 7.

<sup>27</sup> G.C. Exh. 8.

your scheduled working hours, which in effect is stealing time.

The warning letter indicated that Maxwell was discharged, but his discharge was later converted to a 6-day suspension.<sup>28</sup>

It appears that in November 1979 Charles Null was discharged for stealing time. Center Manager Rudy Dickens testified that he and another person had conducted an on-area audit of Null, a package driver, and discovered that Null took extended lunch breaks on successive days rather than his permitted 1-hour lunch-break, and did not record those breaks on his timecard. After these observations Dickens discussed the matter with his immediate supervisor, Don Krevosh, and decided to discharge Null for his flagrant violation of the bargaining contract, but prior to making that decision Null was given the opportunity to relate his side of the story and in so doing admitted he had done wrong and requested another chance.

Null then filed a grievance with respect to his termination and there were resultant meetings between UPS and the Union concerning that grievance. Out of those meetings with the Union, and upon consideration of Null's work record and the fact that he seemed genuinely sorry for his admitted mistake, UPS agreed to reinstate Null after a 10-day suspension, but with a stipulation—agreed upon by Local 505 President James Boyd—that a letter be sent out to all hourly employees warning that in the future any employee caught extending his lunchbreak or taking unauthorized breaks would be subject to immediate termination.<sup>29</sup> In fact, Boyd accepted the letter and informed management that a meeting should be given to all hourly employees concerning the letter's contents, and in accordance therewith meetings were held in the presence of all package drivers in the Huntington and Barboursville Centers where the letter was read to all employees. Dickens testified that he went over the letter to make sure that all understood it and then posted the letter above the timeclock in both facilities. He stated that the letter was posted in the Huntington facility approximately 2 inches away from the timeclock and was positioned so that it would be quite impossible to punch in or out of the facility without seeing the letter—that this letter was posted for a period of at least 2 weeks above the timeclock and which clock Carlos Eaves used in reporting in and out. Dickens stated that since then no Huntington employee caught stealing time was disciplined with anything but discharge.

The General Counsel argues that contrasted to the "shoot to kill" attitude demonstrated by Respondent in its mission to fire Eaves, the above incidents reveal a totally different kind of sensitivity for other employees found in like or even more aggravated circumstances involving some deviation from company norms. Counsel for Respondent points out that none of the incidents in respect to the other drivers, as detailed above, involved the flagrant theft of time of which Eaves was guilty.

In making my evaluations in this aspect of the case—it is noted that after the November 1979 Null incident and

the related letter posting on or about November 13, 1979, employee Marvin Gore was the only employee not terminated for unauthorized breaks. In September 1980, Gore merely received a verbal warning, but this infraction involved an urgent personal telephone call and was fully explained to his supervisor. In February 1980, Gore received a warning letter, but this incident only involved a cup of coffee on a very cold day.<sup>30</sup> I am in agreement with Respondent that the circumstances involving Gore does not match the overall situation surrounding Eaves. In the other instances here enumerated the Company has taken a very consistent course ever since the posting of the letter involving Charles Null.

Turning now to contention by the General Counsel that there were improper authentication of tachograph charts of Respondent, and the logs of Commercial-Lovelace is the following:

As indicated, testimony by Kenneth Scott respecting the analysis of tachograph charts, established that Eaves' version of what occurred on the nights of December 4 and 17 were impossible, or at least highly unlikely, and corroborated by the expert testimony of Larry Beers. Scott's testimony also verified the length and location of Eaves' breaks on the night of March 12, and revealed that the work performed by Eaves prior to his lunch-break at Columbus on that night, took only 26 minutes rather than the longer time as testified by Eaves—and then for the next 1 hour and 48 minutes, the tractor in question remained motionless, but during this entire period the motor was at a high speed idle—probably for cab warmth.

Harry Beard, safety supervisor for Commercial-Lovelace Motor Freight, Inc., testified that Lovelace requires its drivers to maintain a daily log showing, *inter alia*, the time and place of any stop for more than 15 minutes, and pursuant to a subpoena issued at the request of UPS, Beard produced records of Commercial-Lovelace which show the location of drivers employed by them who might have stopped in Waverly, Ohio, on the morning of March 13, 1980. Minard Culbertson, safety manager for UPS, then reviewed the logs produced by Lovelace, and as a result of his review found that only two drivers of Lovelace were in the Waverly area at that time. He testified that the log of Warren Lynn showed that he stopped in the vicinity of Waverly from 3:15 until 4 a.m. on March 13, 1980, and that the log of a driver named Crockett revealed that he stopped for coffee in Waverly from 5 until 5:15 a.m. on the morning of March 13, 1980, but none of the other logs produced indicated a stop by a Commercial-Lovelace driver at Waverly on the evening of March 12 or the morning of March 13, 1980, and neither Eaves nor Bowers nor Perkins placed Eaves at the truck stop at these times.

The General Counsel engaged in considerable cross-examination in respect to Scott and Culbertson and also

<sup>28</sup> G.C. Exh. 9.

<sup>29</sup> See Resp. Exh. 4-c(4).

<sup>30</sup> Kenny Withrow was given the opportunity to resign when he extended his lunch hours in March 1980. In 1981, Calloway was given a written warning, but his situation did not involve any unauthorized breaks, and in July 1980, Dale Maxwell was given a suspension, but again the complaint merely involved telephone calls. Charles Null ended up only receiving a 10-day suspension for unauthorized breaks, but only after the Union agreed to the posted letter, as aforesaid.

conducted quite extensive *voir dire* examinations with opportunities to fully explore their testimony and qualifications, but in final analysis, there is no showing in this record that the logs and charts in question were incomplete, removed, altered, or tampered with in any way, nor was there any showing that they did not correctly reflect the records and charts duly kept by the employers in the ordinary course of their daily business. Moreover, most of the expert testimony involving charts, logs, and timecards was merely in corroboration of credited testimony by other witnesses, as indicated previously herein.<sup>31</sup>

To show that Eaves took an additional hour to make the Columbus run and return, UPS introduced through Ron Held (Resp. Exh. 67) a comparison of the time spent on the job by Eaves, and his successor (Bailey) in the identical job. That comparison shows that Eaves took an average of an hour a day longer, and that this excess hour is attributed to on-road driving time.<sup>32</sup>

It is, of course, well established that a discharge may be for good cause or bad cause, or not cause at all except that a discharge is unlawful when the real motivating purpose is contrary to the prohibitions of Section 8(a)(1) or (3) of the Act. The controlling Board decision on burden of proof in this proceeding is *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). In

<sup>31</sup> In efforts to corroborate Eaves' story of being blocked in at the cafe in Waverly on his return trip, the General Counsel called Patsy Cochenour, the operator of the Biscuit Palace during the time in question. Cochenour testified that she remembered Eaves' last run on March 12-13, 1980, because "it was my granddaughter's birthday, and we had a party." She stated that Eaves had stopped on his break, but as he went out to leave, he had to come back in and asked who was driving the Commercial-Lovelace truck and that it be moved. She said the driver then stated that he was going to first finish his breakfast and that the Lovelace driver moved his rig some 8 minutes later. To impeach Eaves' testimony about buying aspirin at Portsmouth, UPS called Vriena Sharon Metzger, waitress at the Frisches Big Boy Restaurant in Portsmouth, Ohio. She testified that she had been employed in her present capacity for 12 years. She testified further that the restaurant sold no aspirins in March 1980 and that such practice had been discontinued in January 1980. For my conclusions and findings herein, I do not rely on either the testimony of Cochenour or Metzger.

<sup>32</sup> It should be noted that all facts found herein are based on the record as a whole and upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the logic and probability, the demeanor of the witnesses, and the teaching of *N.L.R.B. v. Walton Manufacturing Company and Loganville Pants Co.*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction of the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was in and of itself incredible and unworthy of belief. *All testimony has been reviewed and weighed in the light of the entire record.* Furthermore, it should be especially noted that in several instances I have not credited the circumstances and events as recalled by Eaves in that his testimony, in areas where there was conflict, revealed considerable discrepancies and was also inconsistent at times, and not as convincing and straightforward as the witnesses for Respondent who stated otherwise. The employees who testified for the General Counsel on behalf of Eaves—Gore, Hazelett, Bowen, Johnson, Bailey, and Swann—were either union officers of Local 505 (present or previously) or gave testimony on events and circumstances already established or on matters not overly important or relevant in the final evaluations, and in other instances raised inferences in sheer speculation as to what happened (Swann saw Eaves and Bowers in an argument a few weeks prior to his discharge). Each supervisor in management who played any part in the decision to discharge Eaves, or to uphold that discharge, categorically denied that Eaves' grievances in December 1979 had anything to do with their decision. In other sections of this Decision, additional credibility resolutions have also been made.

*Wright Line*, the Board established the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, it requires that the General Counsel make a *prima facie*, case showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the other employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

I am in accord that the General Counsel in the instant case made a *prima facie* showing sufficient to support the inference that union activities (filing grievances prior to March 13) was a motivating factor in the decision by UPS to discharge Eaves, but I have further found that UPS had legitimate business reasons for its actions. Therefore, I must decide whether UPS has proved that it would have taken the same action even in the absence of the protected conduct, and I find, for all the reasons noted herein, that UPS has met its burden of proof and I am satisfied that because of the legitimate business reasons for the discharge of Eaves—UPS would have taken the same action even in the absence of his protected activities. Accordingly, I have found that the reasons for discharging Eaves was not pretextual but served a legitimate business purpose, and while there was some concern by Respondent over the grievances here in question, the termination would have taken place even in the absence of this protected activity.

As indicated, each UPS supervisor who participated in reaching the decision to discharge Eaves unequivocally and credibly testified that Eaves' grievances played no part in their decision, and that testimony is buttressed by surrounding circumstances and among which are: (1) Eaves was guilty of serious misconduct; (2) his grievances were not the sort to cause retaliation and were accorded little weight or importance by everyone including Eaves, the Union, and UPS; and (3) there is no evidence of UPS' animus to the Union or union activity.

As pointed out, there can be no doubt that Eaves' misconduct was of a very serious nature, and the Union in November 1979 had agreed that such conduct merited immediate termination, as aforesaid. Moreover, it costs UPS approximately \$18 in unearned overtime wages to Eaves on the night and morning in question, and such was accomplished by the falsification of documents required by both company rules and Federal regulations.<sup>33</sup> Furthermore, the evidence in this record clearly reveals that Eaves was guilty of that misconduct. On the night in question there were several separate instances of Eaves' taking unauthorized breaks which he recorded as time spent working. As noted, the first occurred when he stopped in Portsmouth, Ohio. Eaves admitted the stop and did not deny its length, but explained it as a neces-

<sup>33</sup> Ron Held's testimony established the substantial cost which Eaves' practice of taking breaks and logging them as working time causes UPS. He summarized the problems as follows:

... The [paid day] was an hour over; which is approximately \$18 an hour overtime at that time, \$5,000 a year. He had to be speeding to make up his time which is unsafe to himself and unsafe to the public. We have to consider the public image of speeding ... vehicle abuse, speeding, excess of fuel. ...

sary stop to buy aspirin for the flu bug. Even accepting the explanation that Eaves had a compelling personal reason to take a break—he entered the stop on his timecard as time working or time driving, and had he not been followed would have been paid for this time.<sup>34</sup>

The second instance was his next stop at Waverly, Ohio. As indicated Eaves was entitled to a 15-minute break, however, by the credited testimony of Perkins and Bowers, he took 7 extra minutes. Eaves, of course, denied spending more than 15 minutes, but Respondent witnesses stated otherwise and his tachograph chart also showed a stop of some 22 minutes as testified to by Kenneth Scott.<sup>35</sup>

Respondent points out that the tachograph chart is even more revealing on his third stop at the Columbus Center in the early morning hours of March 13. In essence, Eaves' testimony was to the effect that he worked all but his 45-minute lunch period. He testified that from his arrival in Columbus at 12:30 until 1:30 a.m., he spent time driving around the yard unhooking and hooking up his trailer and refueling. Yet for this period the tachograph chart shows his truck movement only for a period of 26 minutes as testified to by Scott. After 1:30 a.m. Eaves, according to his testimony, remained in the tractor on his regular lunchbreak. However, the tachograph shows that his tractor idled at a good rate of speed during 1 hour and 48 minutes and without any movement during this period. Obviously, Eaves was performing no services during this time, yet, he recorded all but the 45-minute lunch period as working time.

On his return trip Eaves again took a break, recorded as working time, at Waverly. Here, he tried to justify this stop as a 10-minute safety check and its excessive length (29 minutes) because he was blocked in by a rig from Commercial-Lovelace, but I have not credited such testimony for reasons previously indicated herein. Therefore, this stop must also be deemed as an unauthorized break and his consideration of it as the time worked is not justified.

As further detailed, the fifth and final false claim for pay occurred in Huntington on March 13 where Eaves went to the restaurant across the street from the center for coffee and stayed for 14 minutes. Eaves claimed and testified that George Bodner, a *discharged* UPS supervisor, authorized the break. Bodner backed up Eaves' testimony, as aforesaid, but as detailed herein I do not credit either of them.

<sup>34</sup> Over-the-road drivers are not subject to being regularly observed—the employer must rely on their honesty in properly recording their time.

<sup>35</sup> Eaves was asked whether the tachograph charts, logs, and timecards introduced into this record (Resp. Exhs. 16 through 46) were his, and he answered by stating "I believe they are mine," but a little later testified that he could not be sure of the tachograph charts. However, on rebuttal the General Counsel went through most of Respondent's exhibits as noted above, and from such Eaves testified as to some of the stops and starts he made on the various days as reflected by such exhibits (from early January into March 1980) and by doing so at least indirectly authenticating all the documents as his. There is also testimony that on occasions Eaves would forget to insert his tachograph chart when starting his run or would remove the chart prior to the completion of his run. Eaves was then asked if he did not care about the charts, and he replied, "I didn't care if they operated correctly or not, because they didn't mean anything to me."

I am in agreement with Respondent that Eaves' lack of truth in this instance is best shown by the fact that he did not raise the defense noted above until after the arbitration of his grievance was completed. Moreover, on cross-examination Eaves admitted that he even failed to mention this alleged approval by Bodner in the March 13 evening meeting with management when he was discharged or in the meeting with Withers following his discharge nor did he mention this approval in the written statement to the AAPGC, and his sole explanation for this failure to mention such a defense was that he did not think "it was that important."

George Bodner suggested in his testimony that it was not unusual for drivers to go across the street for coffee while on the clock; that Manager Rudy Dickens had recently given his approval to do this so long as they only stayed for a few minutes; that on the day Eaves was discharged, Division Manager Ron Thomas asked if there was anything he (Bodner) knew of that Eaves could come back on management with; and that on the following day Manager Ron Thomas handed him several timecards of Eaves with the "ending times" marked out and Bodner's initials beside the markouts and a written time indicated instead. Bodner said that he then explained to Thomas that this was so because in bad weather he would pay Eaves for his lunch when he had not been able to eat, or when he needed a driver to switch trailers in the yard, and on such occasions he (Bodner) would put in a new time on Eaves' card.<sup>36</sup> Bodner also attributed a remark to Manager Krevosh, through Dickens, to the effect that his initials on Eaves' timecards were the "weakest link" in the case against him.

In summary, the reasons I have not credited either Bodner or Eaves in this matter is because their defense as to this incident was not raised until the time of the hearing; their testimony attributing certain remarks were denied by the supervisors involved; and the open admission by Bodner that he and Eaves were very "close." Certainly, the strange circumstances involving the timecards and extra work for Eaves, is quite indicative of this fact. Again, for the fifth time on the night and morning in question, Eaves claimed pay by noting that he was working when he was actually doing no work.

In the final analysis, the main thrust of the General Counsel's case hinges on the contention that Eaves was discharged for engaging in concerted activity in the filing of three grievances on December 18 and 19, 1979. However, this record shows that no one accorded these grievances any real importance, and Eaves certainly did not. On two occasions management arranged meetings to attempt to resolve them, and twice Manager Ron Held drove from Charleston to Huntington for those meetings, but on each occasion Eaves failed to either wait or appear. As noted, on the first occasion Eaves left before Manager Held arrived, even though he was only a few minutes late, and on the second occasion Eaves did not show at all, and as a result Local 505 agreed not to

<sup>36</sup> Manager Thomas admitted talking to Bodner about this matter, but placed the date of their conversation weeks before the discharge of Eaves. Thomas stated that Bodner was altering the timecards in question and he instructed Bodner never to do it again.

pursue the grievances. From such circumstances it is difficult for me to attach any great significance in the filing of the grievances. The Company endeavored to settle them at the local level, and in their attempt to do so were successful to the extent that Eaves displayed so little interest that they were dropped and with the consent of Local 505. The only apparent inconvenience suffered by the Company, if any, was making arrangements for the meetings and getting people there. As further noted, the grievances were also by their very nature quite innocuous—they challenged no fundamental right or no serious disciplinary action, and they were the first grievances filed by Eaves in quite some time. Certainly, there is nothing in the grievances, or Eaves' prior history, which would indicate the sort of militant union activity which would tempt an employer to discriminate. The General Counsel has argued that the grievances adversely reflected on supervisors responsible for Eaves, and as a result they set out to get even. It appears to me that had Eaves pressed his grievances, or had somehow displayed at least some active interest and desire in finalizing his protests, then, under such conditions, some adverse reflections might have been attributed to the supervisors involved. But, in his refusal to pursue his grievances he actually indicated, at least on the surface, that there was no real merit in them and, therefore, it is unlikely that any adverse dispersions were cast on anybody.

In view of the seriousness of Eaves' misconduct, the nonthreatening nature and processing of his grievances, and the absence of any evidence of antiunion animus, it is clear to me that Eaves would have been discharged had he not filed the grievances here in question.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has not engaged in any of the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>37</sup>

The complaint is dismissed in its entirety.

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<sup>37</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.